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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

PAUL KELLOGG,

Petitioner,

-against-

STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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33PP

QUESTION PRESENTED

Whether the newly discovered evidence presented by the petitioner subsequent to the conclusion of his trial warranted a vacatur of his judgment of conviction and whether the state courts' denial of the motion to vacate deprived the petitioner of his constitutional right to due process of law.

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PRELIMINARY STATEMENT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals rendered in this case on March 14, 2001.

OPINIONS BELOW

The opinions of the New York Court of Appeals, the Supreme Court of the State of New York, Appellate Term, and the Criminal Court of the City of New York, County of Queens appear in the Appendix to this petition.

JURISDICTIONAL GROUNDS

The judgment of the New York Court of Appeals was entered on March 14, 2001. No application has been filed for an extension of time within which to file this petition. The Court's jurisdiction is invoked under Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted of assault and criminal possession of a weapon following a jury trial in the Criminal Court of the City of New York, County of Queens. On November 16, 1992, he was sentenced to a term of three years probation and a fine of $1,000.

The charges arose from an incident that occurred at the petitioner's residence on the morning of February 25, 1992. On that date, complaining witness Francisco Cornellia claimed that he was at work when he received a telephone call from his girlfriend, Sonia Matos. In response to the call, he proceeded to go home and noticed that the door to his apartment had been damaged. When he heard knocking at his door, Cornellia opened it and observed the petitioner. During the ensuing altercation, Cornellia claimed that the petitioner struck him in the forehead and arm with an umbrella. As a result, Cornellia sustained a cut on his forehead and bruises on his forehead and arm.

Cornellia admitted that he had punched the petitioner during the altercation and that the petitioner had fallen to the ground as a result. However, when P.O. Hegney, the arresting officer was questioned about the petitioner's physical appearance at the time of the arrest, he claimed that the only injury that he observed was a swelling around the petitioner's nose.

Within two days after his arrest, the petitioner had photographs taken of his face. These photographs depicted the extensive nature of the injuries which he had sustained as a result of his beating by Cornellia. The petitioner then gave the photographs to his father for safekeeping.

When his trial commenced, the petitioner and his father attempted to locate the photographs. However, an exhaustive search by both the petitioner and his father failed to uncover them. At his trial, the petitioner asserted that he was not guilty of intentional assault and that any injuries that Cornellia might have sustained were caused by the petitioner's lawful attempts to defend himself against Cornellia's attack. With no demonstrative evidence to support the petitioner's claim of self-defense, the jury found him guilty of assault in the third degree (N.Y. Penal Law 120.00) and criminal possession of a weapon in the fourth degree (N.Y. Penal Law 265.01).

Following his conviction, the petitioner appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Term which affirmed the conviction. The petitioner's application for a certificate to appeal to the New York Court of Appeals was subsequently denied. Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of New York. In a memorandum and order dated December 5, 1996, the petitioner's application for habeas corpus relief was denied and his petition dismissed.

Subsequent to his conviction in this case, the petitioner was convicted in an unrelated case and sentenced to a term of imprisonment of two and one-third to seven years. During the period of his incarceration, the petitioner's father died and the petitioner's brother took custody of their father's personal effects. After his release from custody, the petitioner had the opportunity to look through his father's personal effects. It was then that he discovered the photographs depicting his injuries. Apparently, these photographs had been inadvertently commingled with some photographs that belonged to his father.

Immediately after his discovery, the petitioner contacted his attorneys and advised that the photographs had been found. Counsel then filed a motion pursuant to N.Y. Criminal Procedure Law 440.10 in the Criminal Court of the City of New York, County of Queens seeking to vacate the judgment of conviction based upon the discovery of the photographs which exculpated the petitioner and constituted newly discovered evidence. In a decision and order dated October 29, 2000, the Criminal Court of the City of New York, County of Queens denied the petitioner's motion. The petitioner then applied for leave to appeal the denial of his motion to the Supreme Court of the State of New York, Appellate Term which denied the application in an order dated January 24, 2001. The petitioner then applied for a certificate to appeal to the highest court in the State of New York, the New York Court of Appeals. That court dismissed the petitioner's application in a certificate dated March 14, 2001.

REASONS FOR GRANTING THE WRIT

THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE DENIAL OF HIS MOTION TO VACATE HIS JUDGMENT OF CONVICTION BASED UPON HIS PRESENTMENT OF NEWLY DISCOVERED EXCULPATORY EVIDENCE.

The photographs depicting the petitioner's injuries, which were lost at the time of his trial, presented dramatic, exculpatory evidence supporting the petitioner's claim that he was the victim, and not the perpetrator in the incident in question. After the petitioner's discovery of the photographs, he promptly brought the matter to the trial court's attention by the filing of a motion to vacate his judgment of conviction pursuant to N.Y. Criminal Procedure Law 440.10. The trial court's summary denial of this motion, and the New York State appellate courts' affirmances of that decision deprived the petitioner of his right to due process of law guaranteed by the 14th Amendment to the U.S. Constitution.

Though motions for a new trial based on newly discovered evidence are generally disfavored, our courts have held that such motions should be granted provided the defendant establishes that (1) the evidence is actually newly discovered; (2) it could not, with due diligence, have been discovered prior to or during trial; (3) the evidence is material and not cumulative or impeaching, and (4) the evidence would probably lead to an acquittal. *United States v. Underwood*, 932 F.2d 1049, 1052 (2d Cir.), *cert. denied*, 502 U.S. 942 (1991). *See, also*, Fed. Rules Cr. Proc. Rule 33.

In cases involving federal habeas corpus claims of innocence, this Court has held that in addition to satisfying the traditional prerequisites for newly discovered evidence, a defendant must show an independent constitutional violation occurring in the underlying state court proceeding. *Herrera v. Collins*, 506 U.S. 390 (1993); *Townsend v. Sain*, 372 U.S. 293 (1963). Of course, a conviction obtained on evidence that does not establish guilt beyond a reasonable doubt violates a defendant's constitutional right to due process. *In re Winship*, 397 U.S. 358 (1970). Judged by any of these standards, the petitioner easily meets his burden of establishing his entitlement to the relief he sought in the state courts, vacatur of his conviction.

As the petitioner attested in his affidavit in support of his motion to vacate, the photographs which depicted the extent of his facial injuries inflicted by prosecution witness Cornellia were unavailable to him at the time of trial as a result of their commingling with other photographs which were in his father's possession. Thus, there could be no dispute that the petitioner's post-trial acquisition of the photographs constituted newly discovered evidence.

The fact that the petitioner had taken the photographs himself, and was therefore aware of their existence, did not undermine his contention that the evidence was newly discovered. For one thing, in determining whether a motion to vacate a conviction based upon newly discovered evidence should be granted, there is no requirement that the evidence must have emanated from a source other than the defendant. Thus, unless it could be shown that the petitioner intentionally refrained from

introducing the photographs at trial, there was no basis for inferring that the petitioner had withheld the evidence for some strategic reason. *United States v. Turns*, 198 F.3d 584 (6th Cir., 2000). Moreover, since the paramount issue at trial was the determination as to whether the petitioner or Cornellia was the wrongdoer, there was simply no rational explanation for the petitioner's withholding of such obvious exculpatory evidence. Indeed, throughout the course of the state court proceedings, the prosecution never even attempted to argue that the petitioner withheld the photographs to gain some strategic advantage.

In addition, the petitioner's affidavit averred that he and his father had made every effort to locate the missing photographs at the commencement of the trial, but that their efforts proved futile. Accordingly, there was ample evidence to support the conclusion that the petitioner had exercised due diligence in attempting to produce the photographs at the time of his trial and that the nonproduction of the photographs was not attributable to any inexcusable neglect on his part. *Fay v. Noia*, 372 U.S. 391 (1963).

Moreover, the photographs provided vivid evidence supporting the petitioner's contention that he had suffered a beating at the hands of prosecution witness Cornellia during the incident in question. Since the petitioner's primary defense at trial was that he had acted in self-defense when he struck Cornellia, the photographs were certainly material to the issue of whether the petitioner's conduct was legally justified. And since the prosecution claimed that the petitioner's injuries were

minimal, and that his claim of self-defense was unsupported, it could not be argued that the introduction of the photographs in evidence would have been merely cumulative or impeaching.

Given the central importance of the petitioner's claim of self-defense, it is clear that no rational trier of fact could have found the essential elements of the crimes of assault and criminal possession of a weapon had the photographs showing the petitioner's injuries been admitted at trial. *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979). With no tangible evidence to sustain the petitioner's assertion that he was the victim of Cornellia's aggression, the jury could scarcely be faulted for rejecting the petitioner's claim that his conduct was justified and did not violate the penal provisions with which he was charged. However, with the photographs that demonstrated the full extent of the petitioner's injuries, it is at least probable, if not certain, that the jury would have exonerated the petitioner of any wrongdoing and that the outcome of his trial would therefore have been dramatically different. In short, the photographic evidence would have created a reasonable doubt that did not otherwise exist. *United States v. Diaz*, 922 F.2d 998, 1006-07 (2d Cir. 1990), *cert. denied*, 500 U.S. 925 (1991).

In sum, the exculpatory evidence which the petitioner presented to the state courts subsequent to his trial constituted newly discovered evidence which established his innocence of the crimes charged. The state court's denial of the petitioner's motion to vacate his judgment of conviction was erroneous and deprived the petitioner

of his constitutional right to due process of law. Under the circumstances, certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

SCHWED & ZUCKER

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Kew Gardens, New York 11415
(718) 263-7676

APPENDIX

EXHIBIT A

CRIMINAL COURT OF THE CITY OF NEW YORK
CRIMINAL TERM: PART JP 1 QUEENS COUNTY

---x

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PAUL KELLOGG

Defendant,

---x

NOTICE OF MOTION

DOCKET 92Q006802

PLEASE TAKE NOTICE, that upon the affirmation of DAVID ZUCKER, ESQ., dated August 14, 2000, hereto annexed and made a part hereof, and upon all the pleadings and proceedings had herein, the undersigned will move this Court on the 12th day of September 2000, at 9:30 in the forenoon of said day or as soon thereafter as Counsel can be heard, for an Order Pursuant to Section 440.10 of the CPL setting aside the defendant's conviction based upon newly discovered evidence.

AND FOR SUCH OTHER and different relief as this Court deems just and proper.

TO: DISTRICT ATTORNEY
Queens County

CLERK OF THE COURT
Queens County

YOURS, etc.

SCHWED & ZUCKER, ESQS.
125-10 Queens Blvd.
Kew Gardens, N.Y.

Dated: Kew Gardens, N.Y.
August 14, 2000

CRIMINAL COURT OF THE CITY OF NEW YORK
CRIMINAL TERM: PART JP 1 QUEENS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PAUL KELLOGG

Defendant,

AFFIRMATION

DOCKET 92Q006802

STATE OF NEW YORK)
) :ss:
COUNTY OF QUEENS)

DAVID ZUCKER, ESQ., duly admitted to practice law in the State of New York, affirms the following to be true under the penalty of perjury, and as to those allegations made upon information and belief, affirmant believes them to be true.

I am retained to represent the above named defendant and have fully familiarized myself with all the proceedings had heretofore.

The defendant, Paul Kellogg was convicted of Assault In The Third Degree and Criminal Possession of a Weapon In The Forth [sic] Degree, both "A" misdemeanors on October 1, 1992 after a Jury Trial in Part JP1, the Hon. Barry Kron presiding.

On November 16, 1992 the defendant was sentence [sic] to a fine plus three years probation. That sentence

was vacated on March 6, 1995 and the defendant was resentenced to time served.

The defendant appealed his conviction to the appellate term of the Supreme Court for the Eleventh Judicial District which affirmed his conviction on November 8, 1993. On January 21, 1994 the New York Court of Appeals denied the defendant's request for leave to appeal, *PEOPLE V. KELLOGG*, 82 N.Y. 2d 926.

The defendant then appealed to the Federal District Court for the Eastern District of New York and his application for "Habeas Corpus" relief was denied by District Judge Joanna Seybert on December 5, 1996.

FACTS PERTAINING TO THE CHARGES

The Prosecution at Trial produced only one witness to the alleged crime, namely Francisco Cornelio, the complainant Mr. Cornelio had claimed that on February 25, 1992 he received a message from his girlfriend, Soma Matos, requesting he return home. (Soma Matos did not testify at the Trial.) His residence was located at 110-27 71st Ave in Forest Hills which is an apartment dwelling wherein the defendant also resided.

Upon returning home the complainant claimed to have noticed damage to his apartment door. The defendant was then alleged to have knocked on the complainant's door and appeared surprised to find the complainant home. When the complainant approached the defendant, it was claimed that the defendant, for no apparent reason, struck the complainant on the head with an umbrella. The complainant admitted to striking the

defendant once in self defense to allegedly ward off a further attack.

The arresting officer, who arrived on the scene after the assault, a Police Officer Hegney, noted a laceration to the compliant's [sic] head and also noted a superficial injury to the defendant that he described as a reddening of the nose.

The defendant has always proclaimed his innocence of the charges. The defendant denied assaulting Mr. Cornelio and claimed that it was he that was in fact assaulted.

NEWLY DISCOVERED EVIDENCE

Following his arrest on February 25, 1992, the defendant sought to document the extent of the injuries he received from the complainant. Toward that end, he had his face photographed. The color pictures, which showed bruising to both eyes and cuts to his cheek, nose and lip, were kept by the defendant for use at Trial as evidence.

Through no fault of the defendant, some of the defendant's personal papers became commingled with those of his farther's, [sic] Dr. Philip Kaminstein. Consequently, as jury selection began the defendant was unable to locate the photographs. He searched his property exhaustively but failed to locate them. These photographs (which are annexed as exhibit "A") were clearly beneficial to the defendant. They demonstrate the extensive character of the assault the defendant endured. The failure to locate them hampered the defendant's claim that Mr. Cornelio viciously attacked him.

Subsequent to the defendant's conviction in this case the defendant was convicted in New York, County, in an unrelated matter, wherein the defendant received an incarceration sentence that imprisoned him until September of 1999. During that time all of his personal effects were left in the custody of his father who subsequently died in January 1996. His brother James Kellogg thereafter became custodian of the defendant's property as well as the personal property of their father.

Sometime in late June, early June, the defendant recovered those photographs from personal papers of his that had become co-mingled with those of his fathers. (See affidavit of defendant attached to this motion.)

QUESTIONS PRESENTED

POINT ONE: The photographs that the Defendant recovered qualifies as newly discovered evidence.

Section 440.10 (g) provides a three prong test as to whether the evidence submitted on a motion to vacate a Judgment of the Court, qualifies as newly discovered evidence. Firstly, the section requires that the evidence could not have been produced at Trial even with due diligence on the part of the defendant, secondly, that the nature and character of the evidence is such that a probability exists that a more favorable verdict against the defendant would have been rendered and finally, that a motion to vacate the judgment be made promptly upon said discovery. This statutory standard has been incorporated into case law as well

> On defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10 (1) (g), it is defendant's burden to show, among other things, that the proffered evidence is in fact newly discovered, i.e., that it was not discovered until after trial and could have been discovered before trial with the exercises of Due Diligence, and is sufficiently probative to likely change the result if a new Trial is granted.
>
> *PEOPLE V. GROTTO*, 241 A.D. 2d 785, 660 N.Y.S. 2d 472 (3rd Dept., July 1997).

The defendant has the burden of convincing the Court, that the defendant could not have produced the evidence at Trial by a preponderance of the evidence. *PEOPLE V. FIEDLER*, 15 A.D. 2d 388 (1989)

A: <u>The photographs could not be produced at Trial</u>

With regard to the first test as specified in section 440.10 (g) of the CPL, the section does not require that the evidence be unknown to the defendant. The section does require that a) the evidence is unavailable and b) that it could not have been produced through on [sic] exercise of due diligence.

Here, as previously stated, the defendant knew of the existence of the photographs but was unable to produce them. He did exercise due diligence in an attempt to locate them, but, through no fault of his own, they were misplaced and not locatable. Clearly the photographs were advantageous to his defense [sic] and would not have been intentionally withheld by him.

The sole question then on this first test set forth in the statute is whether or not the defendant's actions

constituted due diligence. The defendant's affidavit sets forth the actions he took to locate the photographs. He searched his own possessions and asked his father to search all documents he had for the photographs. These efforts continued during Jury selection and also while the Trial was in progress. Having failed in his many attempts to locate them, the defendant assumed they had been inadvertently destroyed.

Over the past eight years the defendant labored under the misconception that the photographs no longer existed. It was only after going over his deceased father's papers did he discover that the photographs and other personal papers had been commingled with his fathers. Clearly the defendant did all that he could in attempting to produce the photographs at the time of his Trial.

B. The newly discovered evidence is of such a nature and character that a jury having seen it, would have reached a more favorable verdict.

The photographs are clearly favorable to the defendant. Anyone viewing them would infer that the defendant had to have been the victim of a serious assault. They clearly show multiple injuries having been inflicted and are not the result of *one* defensive blow claimed by the complainant. This evidence disputes the claims made by the prosecution at the time of Trial and bolsters the defendant's assertion of his innocence.

The defendant, under section 440.10(g) of the CPL is not required to establish that a jury would have definitely acquitted him. The defendant need only show that the evidence, if produced at Trial, is likely to have such an

effect upon a jury in that a more favorable verdict would have been rendered. *PEOPLE V. STUART*, 123 A.D. 2d 46 (1986). Surely a Jury having seen the injuries suffered by the defendant, Mr. Kellogg, would have viewed his defense in a more favorable light and hence a reasonable probability would therefore exist that their verdict would have been different.

There is no way of predicting with absolute certainty that the defendant would have been acquitted but certainly the probability of same is evidence.

C. The defendant has promptly filed this motion upon discovery of the new evidence.

The defendant immediately contacted his attorneys, Schwed & Zucker upon discovery of the photographs. It has taken counsel only a few weeks to locate the files necessary to make this motion and to research the law in regard thereto. There is no time limit on filing a motion pursuant to CPL 440.10 *PEOPLE vs. JACKSON*, 78 N.Y. 2d 638 (1991)

The defendant has therefore timely notified the Court of the evidence and therefore complied with the requirements of Section 440.10(g).

> Once the submission of evidentiary facts creates an issue as to the validity of a judgment of conviction, the defendant, in a proceeding to vacate judgment of conviction, is entitled to a hearing to determine the truth of his allegations, unless his claim has been conclusively refuted by documentary evidence. *PEOPLE V. SESSION*, (1974) 34 N.Y. 2d 254

In the case at bar all facts of the requirements of CPL 440.10 have been met. see also

> To authorize Court in its discretion to grant new Trial on ground of newly discovered evidence, newly discovered evidence must be such as will probably change the result if a new Trial is granted; must have been discovered since Trial; must be such as would not have been discovered before Trial by exercise of Due Diligence; must be material to the issue; and must not be cumulative or merely impeaching. *PEOPLE V. CRANDALL*, (1976, 3d Dept) 51 App Div 2d 841

The Due Diligence standard has been met, the evidence meets all stated requirements, personal affidavits, and objective photographs have been produced, defendant has met the threshold, namely the preponderance of evidence standard, and counsel therefore asks this Court to proceed to hold a hearing as stated in CPL 440.10.

Point Two: The Defendant's motion to set aside the verdict and grant him a new Trial should be granted in the interest of Justice

The Courts have always had inherent equity power to enable them to render substantial justice in all matters. While the prosecution may oppose this motion on some technical ground, the interest of justice is best served if the innocent are not convicted of crimes they did not commit.

The defendant, Paul Kellogg has always maintained his innocence. Although eight years have passed since his conviction, although his obligations to the Court have

expired more than five years ago he has persisted in asserting his innocent in an attempt to clear his name.

The only consequence that essentially remains for the People is whether the defendant will have the convictions for two misdemeanors remaining on his record. In bringing this motion the defendant places at risk a retrial and punishment more sever than originally meted out. Knowing this, the defendant, nevertheless has sought to correct a wrong committed against him eight years ago and in counsel's view of the interests of justice are best served by granting this matter

Respectfully Submitted,

_____
DAVID ZUCKER, ESQ.,

CRIMINAL COURT OF THE CITY OF NEW YORK
QUEENS COUNTY PART JP 1

THE PEOPLE OF THE STATE OF NEW YORK, -against- PAUL KELLOGG Defendant,	DOCKET #92Q006802 AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE CONVICTION

Paul Kellogg, being duly sworn deposes and says:

I am the defendant in the above entitled action and am fully familiar with all proceedings in regard to my case.

On or about October 1, 1992 a Queens Criminal Court Jury convicted me of the crimes of Assault In The Third Degree and Criminal Possession Of A Weapon In The Fourth Degree. I was sentenced initially to three years probation and a one thousand dollar fine on November 16, 1992, however, that sentence was vacated on March 6, 1995 and I was re-sentenced to time served.

At the Trial of my case, I had asserted through my counsel, Michael Schwed, that it was I, rather than the complainant, Francisco Cornelio, who was the victim of a vicious, unwarranted assault.

Following my arrest on this case, which occurred on or about February 25, 1992, I had my face photographed to document the extent of the injuries inflicted upon me. The photographs were taken within a 48 hour period of the incident. I had given the photographs along with other personal papers to my father, Dr. Philip Kaminstein, for safe keeping during the pendency of my case.

As jury selection began on my case, during the last week of September 1992, I sough [sic] to locate the photographs I had taken. Though I searched my papers exhaustively, I could not find them. My father also searched his papers and was also unable to locate the photographs.

At the Trial, the prosecution sought to minimize the effect of any injury I might have received from the complainant. The Police Officer who testified, Police Officer Hegney, further stated that the only injury he observed on me was a slight redness of the nose. Unable to document the extent of my injuries, the jury chose to ignore any claim that the complainant had, in fact, assaulted me.

Following my sentence, I was later incarcerated on an unrelated matter in New York County. I was not released from prison until September 1999. During my incarceration all my personal papers were in the care and custody of my father, Dr. Philip Kaminstein. Upon his death, In 1996, my brother James Kellogg became the custodian of my personal effects as well as my father's.

In the end of June 2000, while going through personal papers of mine and my fathers, I found the photographs that were taken of me subsequent to my arrest in this case. The photographs had apparently become comingled with my father's personal papers and had eluded our original search.

Those photographs (which I have attached as defendant's A) clearly shows the extent of the assault I suffered. Noticeable on the pictures are injuries to both eyes, left cheek, left side of nose and upper lip. Those injuries were obviously the result of several blows I received from the complainant.

Although eight years have passed since my case was determined, I believe the existence of this evidence, which was not available at the Trial, would have caused the jury to acquit me had they been able to view them. (Please note that the photographs attached are copies of the original color prints which I have in my possession.)

Therefore, I ask the Court to grant the motion filed by my attorney to set aside my conviction and grant me a new Trial, or in the alternative, to order a hearing to

determine whether or not the relief requested should be granted.

Respectfully Submitted,

_____
PAUL KELLOGG

Sworn to before me
this ___ day of ___ 2000

_____
Notary Public

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART T-1

———————————x

THE PEOPLE OF THE
STATE OF NEW YORK

-against-
PAUL KELLOGG,

Defendant,

———————————x

Decision and Order

Docket No. 92Q006802

HEFFERNAN, J.

The defendant was convicted of assault in the third degree and criminal possession of a weapon in the fourth degree on October 1, 1992 after a jury trial. On November 16, 1992, the defendant was sentenced to a fine and three years probation. On March 6, 1995, the Court revoked the defendant's probation in light of his prison term on another matter and re-sentenced the defendant to the time served. The defendant appealed his conviction on the Appellate Term which affirmed his conviction on November 8, 1993. On January 21, 1994, the Court of Appeals denied the defendant's request for leave to appeal.

Defendant now moves to vacate his judgement of conviction pursuant to section 440.10(1)(g) of the Criminal Procedure Law, based on a claim of newly discovered evidence. The "newly discovered evidence" consists of photographs that the defendant allegedly had taken of himself shortly after his arrest which depict bruising to his face. The defendant claims that these photographs represent new evidence because they show that it was he

rather than the complainant who was the victim of an assault. The defendant claims that at the time of his trial, he tried to locate the photographs, but failed to do so. The photographs allegedly only came into the defendant's possession after he was released from incarceration on an unrelated matter when he found them among the personal effects left by his deceased father.

Pursuant to section 440.10(1)(g) a judgment may be vacated upon the ground that new evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence. It is well settled that to be considered newly discovered evidence, the evidence must be such as will probably change the result if a new trial is granted; must be such as could not have been discovered before the trial with the exercise of due diligence; must be material to the issue, must not be cumulative to the former issue, and must not merely impeach or contradict the former evidence. *See, People v Salemi,* 309 NY 208; *People v Branch,* 175 Misc 2d 933.

The defendant's argument that the photographs represent new evidence must fail for several reasons. To begin with, the admission of the photographs depicting the defendant's bruises would have been merely cumulative of an issue raised and settled during trial. During the trial, through the testimony of the complainant and the

arresting officer, the defendant was able to establish that he received injuries during the altercation and that the complainant punched the defendant in the face. Secondly, even if, as the defendant contends, that the photographs would contradict the police officer's depiction of the defendant's bruises as slight, the defendant's motion should be denied since evidence that merely impeaches or contradicts former evidence may not be considered as newly discovered evidence. Thirdly, the defendant has not convinced this Court that the photographs could not have been discovered at the trial with the exercise of due diligence. Evidently, the photographs were readily available and in the possession of the defendant's father in a place that was allegedly thoroughly searched. Obviously, had the defendant searched thoroughly for the photographs in a place that they were ultimately found, the defendant would have found them in time for trial. Finally, the defendant has not demonstrated that the evidence if produced at a new trial will result in a different verdict.

For all the foregoing reasons, the defendant's motion to vacate his judgement pursuant to CPL 440.10(1)(g) is denied. This opinion constitutes the decision and order of the court.

Dated: October 20, 2000
Kew Gardens, New York

/s/ LMJ
CHARLES J. HEFFERNAN, JR.
JUDGE OF THE CRIMINAL
COURT

2000-[illegible]-Q CR

At a term of the Appellate Term of the Supreme Court of the State of New York for the 2nd and 11th Judicial Districts held in KINGS County on 1/24/2001

Present:
Hon. GLORIA COHEN ARONIN JUSTICE PRESIDING
Present:
Hon. LEONARD SCHOLNICK
Present:
Hon. MICHELLE WESTON PATTERSON Justices

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT

vs.

PAUL KELLOGG

APPELLANT

The above named appellant having been sentenced in CRIMINAL COURT, KINGS COUNTY and having moved this court by notice of motion returnable 11/27/00 for leave to appeal a post trial order dated 10/29/2000 and the motion having duly come on to be heard;

NOW, on reading and filing the papers in support of said motions and papers having been filed in opposition

thereto, and due deliberation having been had thereon, it is:

ORDERED that the motion by defendant-appellant for leave to appeal is denied.

GLORIA COHEN ARONIN
ASSOCIATE JUSTICE
APPELLATE TERM
SUPREME COURT, STATE OF
NEW YORK

JUSTICE PRESIDING
APPELLATE TERM

State of New York
Court of Appeals

BEFORE: HON. ALBERT M. ROSENBLATT, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

PAUL KELLOGG,

Appellant.

CERTIFICATE DISMISSING APPLICATION

I, ALBERT M. ROSENBLATT, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to section 460.20 of the Criminal Procedure Law is dismissed because the order* sought to be appealed is not appealable under Criminal Procedure Law, section 450.90(1).

Dated: March 14, 2001
Poughkeepsie, New York

/s/ Arnold Rosenblatt
Associate Judge

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* Description of Order: Order of the Appellate Term of the Supreme Court for the 2nd and 11th Judicial Districts denying appellant's motion for leave to appeal to the Appellate Term a post trial order dated October 29, 2000